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No. 86-1679

In The
Supreme Court of the United States
October Term, 1986

SYLVIA AVERBACH,

Petitioner,

v.

RIVAL MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, RIVAL MANUFACTURING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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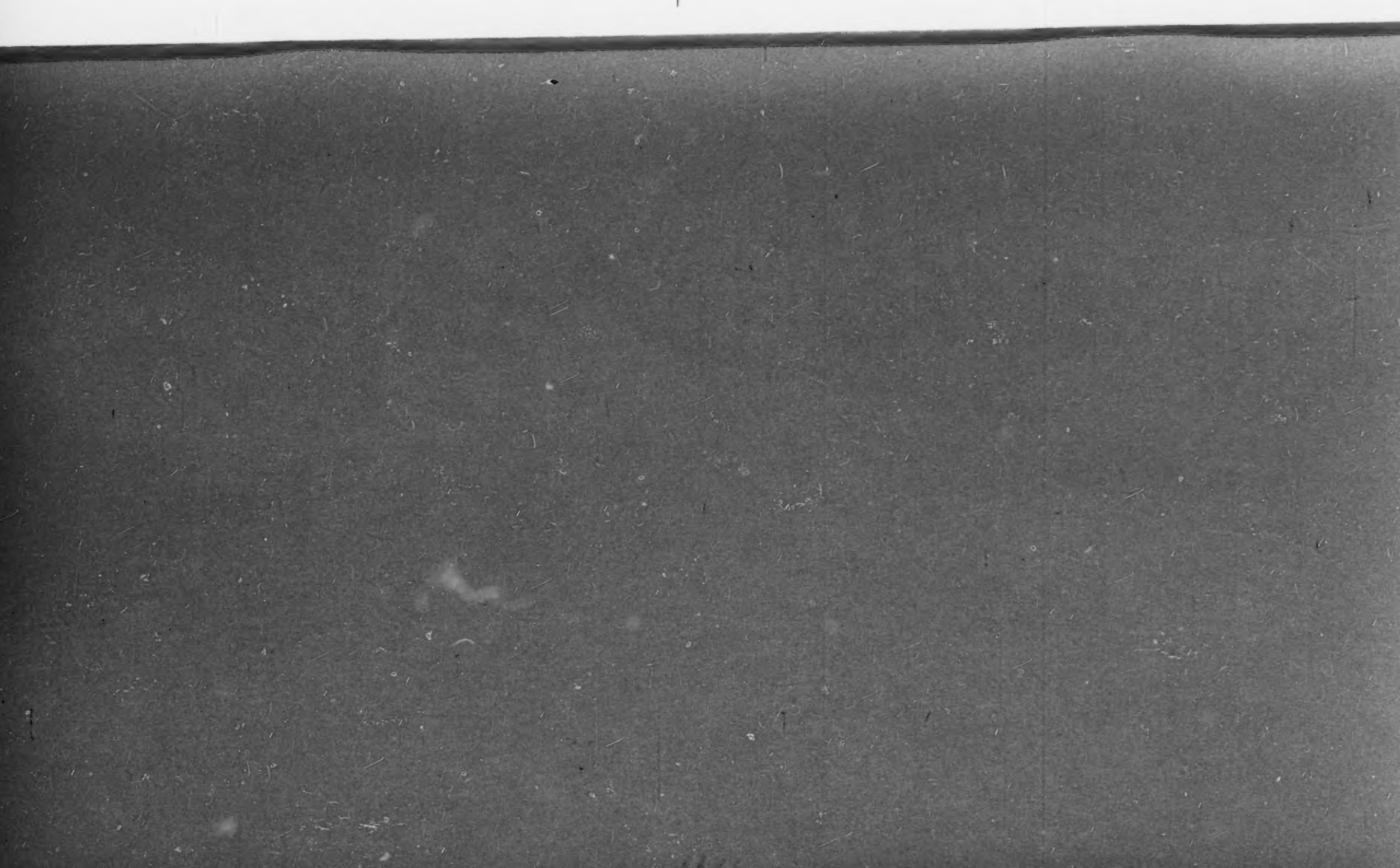

QUESTION PRESENTED

Did the District Court, as affirmed by the Court of Appeals for the Third Circuit, correctly conclude that a litigant did not conduct or participate in the conduct of the affairs of the United States District Court, the purported enterprise, under 18 U.S.C. § 1962(c) by allegedly failing to answer Interrogatories accurately in a products liability case?

RULE 28.1 LIST

The parent company of respondent is Rival Holdings, Inc. The only subsidiary of respondent which is not wholly owned is Bennington Properties, Inc. The respondent does not have any affiliated companies.

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Respondent, Rival Manufacturing Company, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Third Circuit's Opinion concerning the RICO count of the Complaint.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 809 F.2d 1016 (3d Cir. 1987). The Opinion of November 18, 1985 of the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) has not been reported; it is reprinted in the Appendix attached to the Petition (A-14). The District Court's Order denying the petitioner's Motion for Leave to Amend the Complaint to allege obstruction of justice as a predicate act is reprinted in the Supplemental Appendix attached to this brief (S.A.-1). Judge Huyett's Opinion of March 11, 1986 is also not reported, and it is reprinted in the Supplemental Appendix (S.A.-2).

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JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331, and there was a pendent state law fraud claim. Additionally, there was diversity of citizenship even though jurisdiction on this basis was not alleged in the Complaint.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

STATEMENT OF THE CASE

On April 21, 1978, Sylvia Averbach (Averbach), instituted an action against Rival Manufacturing Company

(Rival) in the United States District Court for the Eastern District of Pennsylvania in an effort to recover damages for losses allegedly sustained during a fire to her home. She alleged that the fire was caused by a knife sharpener/can opener, Model No. 731/1, manufactured by Rival. Averbach forwarded Interrogatories which were answered by Rival, and she asked in Interrogatory No. 40 whether Rival had within the past five years received complaints of an occurrence similar to that allegedly experienced by her. Rival's answer was that it was aware of an occurence on December 7, 1976 in which it was claimed that Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. Rival denied that claim, and it was dropped by the claimant.

Rival also answered Averbach's Expert Interrogatories. In Interrogatory No. 14, Averbach asked whether, at any time prior to the occurrence which was the subject matter of that case, any investigation, test, inspection or examination was conducted with respect to the product. In its Answer, Rival stated that it understood that the Interrogatory referred to its product, obviously referring to Model 731/1 Can Opener/Knife Sharpener, and it referred to information which had previously been given.

Defendant, S. Klein Department Stores, also served Interrogatories upon Rival, and, in Interrogatory No. 19, it asked whether Rival had received any complaints of injury or property damage or other unusual occurrence similar to those allegedly experienced by Averbach. Rival again responded by referring to the incident of December 7, 1976.

On February 24, 1978, counsel for Averbach wrote to the Consumer Products Safety Commission (CPSC)

inquiring as to other fires allegedly involving Rival can openers, but no response was received.

Averbach's case proceeded to trial, and the jury found in favor of Rival on June 5, 1981. Judgment was entered on the verdict, and no appeal was taken by Averbach.

In August, 1983, counsel for Averbach learned from the CPSC in connection with an unrelated case that there may have been other fire incidents concerning can openers. Averbach's counsel wrote to the CPSC requesting information, and he subsequently received documents which are attached to the Complaint in the present action. According to Averbach's allegations, these documents indicate that complaints had been received by Rival concerning the alleged involvement of can openers in fire. From this information, Averbach concluded that Rival was not candid with her during the discovery process, that she could have presented to the jury the fact that Rival can openers were a common and serious problem known to Rival, and that there could have been a different jury verdict.[1]

On September 28, 1984, Averbach filed a Motion for New Trial under Federal Rule of Civil Procedure 60(b) and alleged that Rival had failed to answer Interrogatories accurately. The District Court denied Averbach's Motion, and this denial was affirmed by the Court of Appeals for

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1. In ruling upon the respondent's Motion to Dismiss, the District Court and the Third Circuit accepted as true all of the well-pleaded allegations of the Complaint. However, the respondent specifically denies that any Answers to Interrogatories were deceptive or incomplete, as they were truthful and they provided full, complete and accurate information.

the Third Circuit by Judgment Order on October 31, 1985. Averbach's Petition for Rehearing was denied on December 9, 1985.

The present action was filed in May, 1985, and the substantive allegations of Averbach's Complaint are identical to those of her Motion for New Trial. In Count One, Averbach alleges that she is entitled to recover under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*, because Rival had engaged in a pattern of racketeering activity, Rival had defrauded her and corrupted the Court of the Eastern District of Pennsylvania (which Court is alleged to be an "enterprise"), Rival had committed mail fraud in violation of 18 U.S.C. 1341 and wire fraud in violation of 18 U.S.C. 1343, and, as a result thereof, she has suffered economic injury and detriment. In Count Two, Averbach makes a common law fraud claim on the basis of allegations that Rival had fraudulently withheld relevant evidence from her and that, as a result of this conduct, the plaintiff, the Court and the jury were deceived.

Averbach filed a Motion for Leave to Amend the Complaint to allege obstruction of justice as a predicate act on September 9, 1985.

On November 18, 1985, the District Court dismissed the Complaint because Count One failed to state a claim upon which relief could be granted under RICO and specifically under 18 U.S.C. § 1962(c) in that Rival did not conduct or participate in the conduct or affairs of the United States District Court; the pendent state law claim in Count Two was dismissed because the Complaint did not allege jurisdiction based upon diversity of citizenship.

The Motion for Leave to Amend was denied because it did not cure the grounds for dismissal. Averbach then filed a Motion for Reconsideration and a Motion for Leave to Amend the Complaint in order to allege jurisdiction based upon diversity of citizenship. Both Motions were denied on March 11, 1986.

On appeal to the Court of Appeals for the Third Circuit, the dismissal of the RICO count was affirmed because of the Court's conclusion that Rival did not conduct or participate in the conduct of the affairs of the purported enterprise. The fraud count was reversed and remanded because of the Court of Appeals' conclusion that (1) the Complaint set forth the pleading requirements for a cause of action for fraud, (2) the requirements of an independent action under Rule 60(b) were met in that the elements for such an action are no different than those for a Motion for New Trial under Rule 60(b)(3), and (3) the "extrinsic/intrinsic" fraud distinction is not followed by the Third Circuit.

———o———

REASONS FOR DENYING THE WRIT

A. This case does not involve an issue in which there has been a conflict among the Courts of Appeals and it does not present any important question of law justifying review by this Court.

This case is based upon Answers which Rival gave to certain Interrogatories served by Averbach in a products liability action. The Interrogatories included definitions and instructions. Averbach is attempting to stretch this

discovery question into a claim that Rival engaged in a pattern of racketeering activity. Both the District Court and the Court of Appeals for the Third Circuit rejected her claim because Rival did not conduct or participate in the conduct of the District Court, as is required by Section 1962(c).

There is no claim by Averbach that the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of any other Court of Appeals. The decisions of the District Court and the Court of Appeals were based upon the specific facts of this case, and it is unlikely that review of the issue presented by Averbach will impact anyone other than the litigants. Accordingly, this case does not present any issue justifying review by this Court.

B. The District Court, as affirmed by the Court of Appeals, correctly concluded that Rival did not conduct or participate in the conduct of the affairs of the United States District Court, the purported enterprise, under 18 U.S.C. § 1962(c) by allegedly failing to answer Interrogatories accurately in a products liability action.

In order for a plaintiff to state a cause of action upon which relief can be granted for violation of Section 1962(c)[2] it must be alleged that he suffered injury because a person employed by or associated with an enterprise conducted or participated, directly or indirectly, in the conduct of such

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2. Averbach's Complaint does not mention Section 1962(c). However, it is clear from her Answer to Rival's Motion to Dismiss, her brief filed in the Third Circuit, and in her Petition for Writ of Certiorari that she contends that it is Section 1962(c) which was violated.

enterprise's affairs through a pattern of racketeering activity. Accordingly, the issue in this case is whether Rival conducted or participated in the conduct of the affairs of the United States District Court for the Eastern District of Pennsylvania by allegedly failing to answer Interrogatories accurately in a products liability action. The District Court and the Third Circuit correctly applied Section 1962(c) by holding that Rival's position as a mere litigant did not reach the level required to "conduct or participate . . . in the conduct of such enterprise's affairs". The language of Section 1962(c) requires that the defendant "conduct or participate . . . in the conduct" and not merely that it have some connection with the enterprise which does not reach this level of involvement.

Courts of Appeals and District Courts which have addressed this issue have found that the defendant's involvement with the conduct of the enterprise must be such that the defendant takes part in the enterprise's operations. This issue was discussed at length in *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), reversed on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). The Court of Appeals for the Fourth Circuit agreed with the District Court's conclusion that the "conduct or participate" language in Section 1962(c) requires "some involvement in the operation or management of an enterprise", *id.,* 591 F.2d at 1374, and it stated that

> [a]s the District Court said: "A comparison of the language [of the legislative history] used above to describe Section 1962(c) with the language of Section 1962(c) indicates that the words 'operation of any enterprise' were meant to describe the phrase 'conduct

> or participate, directly or indirectly, in the conduct of such enterprise's affairs.' "
>
> . . .
>
> We have reviewed the legislative history of 18 U.S.C. § 1962(c) and have concluded that the District Court was correct in its interpretation. We find additional support for its view in the use of the word "through" in the statute which would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business. Indeed, this connection must be shown if the word "through" is to have any meaning in the statute. Without the word "through", anyone who used income from illegitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c). We do not believe that Congress meant to sweep so broadly, ...

Id., 591 F.2d at 1375.

In *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983), cert. denied sub. nom. *Prudential Insurance Co. of America v. Bennett*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed. 2d 710 (1983), present and former residents of a retirement community brought a RICO action against several defendants because of alleged financial mismanagement resulting in the loss of "life care" which they expected to receive. The *en banc* Court stated that it was concerned ". . . that the Complaint may be deficient as failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant." *Id.* at 1364 (emphasis in original). The Court went on to state that

> [m]ere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause

> of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself. . . .

Id. See also *United States v. Zemek,* 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916, 985, 452 U.S. 905 (1981) (The Fourth Circuit's conclusion that the "conduct or participate" language in Section 1962(c) requires proof of involvement in the operation or management of the RICO enterprise is favorably cited); *Agristor Leasing v. Meuli,* 634 F.Supp. 1208 (D.Kan. 1986) (". . . [T]he 'person' committing the racketeering activity must have at least some involvement in the management or everyday affairs of the 'enterprise' in order to satisfy the 'conduct through' requirement." *Id.* at 1223); *John Peterson Motors, Inc. v. General Motors Corporation,* 613 F.Supp. 887 (D.C. Minn. 1985) ("A RICO defendant must play a more dominant, active ownership or management role than is alleged here." *Id.*, at 900).

In the present action, Averbach does not allege in her Complaint that Rival conducted or participated in the conduct of the affairs of the District Court, and she makes no allegation that Rival was involved in the operation, management or everyday affairs of the District Court. It is clear from her allegations that Rival was merely a defendant in a products liability case. The Third Circuit was correct in affirming the decision of the District Court that Rival did not conduct or participate in the affairs of the District Court and that its activities were not designed to corrupt the operations of the Court's own processes; it stated that

> [w]hereas litigants before courts call upon the courts to exercise the judicial process, they do not par-

> ticipate in it in the sense intended by Congress in 18 U.S.C. § 1962(c) (1982). Such litigants do not share with the Court's personnel a common purpose with respect to the activity complained of. Indeed, Averbach's allegations suggest that while those responsible for conducting Rival Manufacturing Company's defense of product liability litigation may have had a common or shared purpose, that purpose was quite at variance with those of the judges and support personnel of the District Court. If Averbach's allegations are true, no more occurred with respect to the enterprise in question then to mislead those who conducted it. That is not, in our view, equivalent to the participation in its affairs which is required by 18 U.S.C. § 1962(c) (1982).

Averbach's position is that this Court has stated that RICO is to be read broadly and that a broad reading would permit her to pursue her RICO count in this case. However, it would require a torturing of the language of Section 1962(c) to conclude that the District Court and the Third Circuit erred with respect to the dismissal of the RICO count, as the allegations of the Complaint simply do not meet the requirements of that section.

Finally, it is noted that Averbach states that "perhaps" the Courts below dismissed the RICO count because they found it to be defective under Rule 9(b). This is not an issue, as both the District Court and the Court of Appeals set forth their reasons that the RICO count did not state a claim upon which relief could be granted, and they do not refer to the pleading requirements of Rule 9(b).

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CONCLUSION

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	CIVIL ACTION
v.	)	NO. 85-2794
	)	
RIVAL MANUFACTURING COMPANY	)	Filed Nov. 19, 1985
	)	

ORDER

NOW, November 18, 1985, upon consideration of plaintiff's motion for leave to amend her complaint and because:

I have granted defendant's motion to dismiss the original complaint. The proposed amended complaint does not cure the grounds for dismissal.

IT IS ORDERED that plaintiff's motion to amend her complaint is DENIED AS MOOT.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	CIVIL ACTION
v.	)	
	)	NO. 85-2794
	)	
RIVAL MANUFACTURING COMPANY	)	Filed Mar. 12, 1986

MEMORANDUM AND ORDER

HUYETT, J. March 11, 1986

This action arises from a products liability action which plaintiff filed almost eight years ago. In April of 1978, plaintiff filed her complaint alleging that an electric can opener manufactured by the defendant, Rival Manufacturing Company (Rival), malfunctioned and resulted in a fire that caused extensive damage to plaintiff's residence. The matter was tried in June of 1981, before Judge Van Artsdalen, and the jury returned a verdict in favor of the defendant. That judgment was not appealed.

In September of 1984, more than three years after entry of the judgment, plaintiff filed a motion for a new trial, pursuant to Fed.R.Civ.P. 60(b), alleging that Rival had not been forthcoming and honest in response to a discovery request of plaintiff. Specifically, plaintiff had asked defendant whether it had received other claims or complaints about Rival electric can openers causing fires. Defendant answered this in the negative. Plaintiff subsequently learned that Rival did have notice of other claims or complaints concerning its can openers. Rival contends that the other claims and complaints concerned different models and were therefore not relevant to plaintiff's action.

Plaintiff's Rule 60(b) motion was denied in February, 1985. That denial was appealed to and affirmed by the Third Circuit Court of Appeals in November, 1985.

In May 1985, plaintiff filed the complaint which is the subject of the present action, alleging that Rival's conduct with respect to plaintiff's discovery request was a violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, (hereinafter RICO), and constituted fraud under state law. Defendant filed a motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), which I granted by order dated November 18, 1985. The denial was based on my opinion that the RICO allegation was insufficient in that the defendant did not "conduct" or "participate" in the affairs of the United States District Court for the Eastern District of Pennsylvania, which plaintiff had alleged was the requisite "enterprise" under RICO. Plaintiff's complaint made no allegation of jurisdiction based upon diversity of citizenship and so I dismissed the pendent state law fraud claim as well.

Presently before me are plaintiff's motion for reconsideration of the order dismissing the complaint and plaintiff's motion to amend her complaint to allege diversity of citizenship.

MOTION FOR RECONSIDERATION

Plaintiff's motion for reconsideration will be denied because she presents no basis for concluding that my decision to dismiss the complaint was incorrect or improper. Plaintiff does, however, make certain comments that I feel obligated to address.

Plaintiff is under the misguided perception that I have no concern for perjury and fraud and have failed to un-

derstand the allegations made in plaintiff's complaint. I do have the utmost concern for perjury, fraud or any other device that is intended to sidetrack the proper administration of justice, and I do not take lightly allegations of such behavior. However, I have an equally pressing concern for the proper interpretation and application of the law.

I dismissed plaintiff's complaint because it failed to state a cause of action under the relevant provisions of RICO. Plaintiff's motion for reconsideration is devoid of any authority to suggest that my decision to dismiss the complaint was erroneous or improper. Plaintiff addresses RICO in one short paragraph and cites a case that simply is not relevant to this matter.[1]

In her motion for reconsideration, plaintiff expresses concern over my mention and alleged review of the appeal pertaining to plaintiff's unsuccessful motion pursuant to Fed.R.Civ.P. 60(b), and Judge VanArtsdalen's assessment of the merits of that motion. Plaintiff's concern is difficult to understand because I did not review the appeal mentioned by plaintiff nor did I rely upon the disposition of her Rule 60(b) motion. Both the Rule 60(b) motion and its subsequent affirmation on appeal were simply men-

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1. Plaintiff cites *Bennett v. Trust Co. of New York*, 770 F.2d 308 (2d Cir. 1985) as reaching a conclusion contrary to my holding that a litigant does not "conduct or participate" in the affairs of a court for purposes of RICO. *Bennett* involved an analysis of what constitutes an enterprise under RICO. Had plaintiff read footnote one in my memorandum opinion, she would have noted that I assumed *arguendo* that the district court was an "enterprise" for purposes of RICO. *Bennett* offers no opinion as to the "conduct" or "participate" requirement of RICO.

tioned to provide the reader of the opinion with an accurate case history.

In her supplemental memorandum of law, plaintiff offers the case of *Northeast Women's Center, Inc. v. McMonagle,* No. 85-4845, slip op. (E.D. Pa. October 25, 1985) as support for her contention that her complaint should not have been dismissed. Plaintiff's reliance on that case, however, is misplaced. The Northeast Wamen's Center, Inc. filed that action against a group of individuals alleging that the individuals had committed various criminal acts damaging plaintiff's property and business. Plaintiff's complaint included a RICO count; defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) which was denied by Judge Kelly in an order dated October 25, 1985.

Because the Northeast Women's Center complaint survived a motion to dismiss, plaintiff contends that her complaint should also survive a motion to dismiss. Unfortunately, the only similarity between these cases is that both involve RICO counts. Plaintiff contends that although the pro-life defendants in *Northeast Women's Center* did not "conduct" or "participate" in the affairs of the center, they were found to have disrupted the affairs of plaintiff's business activities.

First, contrary to plaintiff's assertion, Judge Kelly did not find that the defendants had disrupted plaintiff's business activities; rather, he denied a motion to dismiss, concluding that the allegations were sufficient to state a cause of action. More importantly, Judge Kelly did not address the issue of whether the defendants had participated or conducted in the affairs of the enterprise, but he

noted that the alleged enterprise had been described by the plaintiff as "a 'group of individuals who have entered into a conspiracy which has as its goal the destruction of plaintiff's business and property.' " *See* slip opinion, *Northeast Women's Center,* at 4. Therefore, the Women's Center was not the enterprise alleged by plaintiffs and it was irrelevant whether the defendants conducted or participated in the affairs of the center.

In this case, plaintiff has alleged that the United States District Court for the Eastern District of Pennsylvania was the enterprise; a necessary element to a RICO claim is that the defendant conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs . . ." 18 U.S.C. § 1962(c). Because defendant Rival does not conduct or participate in the affairs of the United States District Court for the Eastern District, I concluded that defendant's motion to dismiss should be granted. I have been presented with no reason or authority which would cause me to alter my prior decision.

MOTION TO AMEND COMPLAINT

Plaintiff has also filed a motion to amend her complaint to allege diversity of citizenship with respect to the state law fraud count.

Federal Rule of Civil Procedure 15(a) provides:

> Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by

> leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . .

In the present action, defendant filed a motion to dismiss before responding to plaintiff's complaint. A motion to dismiss [pursuant to Fed.R.Civ.P. 12(b)(6)] is not considered to be a responsive pleading for purposes of Rule 15(a). *Schnabel v. Bldg. & Construction Trades Council of Phila.*, 563 F. Supp. 1030, 1035 (E.D. Pa. 1983). Were it not for the fact that defendant's 12(b)(6) motion had been granted and an order dismissing the action entered, plaintiff would be entitled, as a matter of course, to amend her complaint. Once a motion to dismiss has been granted, however, a plaintiff does not have a right to amend a complaint but may do so only by leave of court. *Kelly v. Delaware River Joint Commission*, 187 F.2d 93 (3rd Cir. 1951), *cert. denied*, 342 U.S. 812 (1951), *Kauffman v. Moss*, 420 F.2d 1270 (1970).

While it is true that leave to amend will be freely given when justice so requires, *see* Fed.R.Civ.P. 15(a), leave will be denied where the proposed amendment does not cure the deficiency of the original complaint. *Hall v. Pennsylvania State Police*, 433 F. Supp. 385 (E.D. Pa. 1976). One standard for testing the adequacy of the proposed amended complaint is whether it states a claim sufficient to survive a motion to dismiss. *Dixon v. Pennsylvania Crime Commission*, 67 F.R.D. 425 (M.D. Pa. 1975). Using the 12(b)(6) standard as a guide, I must examine the proposed amended complaint, accepting as true all well-pleaded factual averments and construing it with all inferences in favor of plaintiff. *Jenkins v. McKeithen*, 359 U.S. 411 (1969), *Conley v. Gibson*, 355 U.S. 41 (1957).

The elements of fraud, under the common law of Pennsylvania, which governs the fraud count, are: (1) a misrepresentation of fact, (2) fraudulently uttered, (3) with the intent to induce action, (4) which action is taken upon justifiable reliance on the misrepresentation, (5) to the detriment of the injured party. *Thomas v. Seaman,* 451 Pa. 347, 304 A.2d 134 (1973). I find that plaintiff has failed to allege sufficiently the elements of common law fraud and consequently has not stated a cause of action that can survive a motion to dismiss. The complaint fails to allege that defendants intended to induce action on the part of plaintiff or that plaintiff justifiably relied upon the alleged misrepresentations. As a result of plaintiff's deficient pleading, leave to amend to allege diversity is therefore denied.

Defendant contends that plaintiff's complaint could also be dismissed because it does not satisfy the requirements of Fed.R.Civ.P. 60(b). This is an equally persuasive reason for not granting leave to amend.

Rule 60(b) provides six specific grounds for relief from judgment. Grounds 1, 2, 3 must be raised within one year of judgment, while grounds 4, 5 and 6 must be brought within a reasonable time. Ground 3 is directed to fraud, misrepresentation or misconduct of an adverse party and it would be the applicable grounds in the present case. Motions under 60(b) do not limit the power of the court to hear an independent action seeking relief from judgment or to set aside a judgment for fraud upon the court. The rule imposes no time limitation on the latter two procedures. However, to protect the integrity of the time limitations imposed by 60(b)(3), acts which constitute fraud,

misrepresentation, or adversarial misconduct cannot be raised, untimely, in an independent action. Consequently, if relief is sought by independent action alleging fraud, as it is here, the party seeking relief must allege something more substantial than the fraud to which 60(b)(3) is directed. For plaintiff successfully to seek relief from judgment for fraud, more than one year after entry of judgment, she must sufficiently allege "fraud upon the court." *See, Home Box Office, Inc. v. Spectrum Electronics, Inc.*, 100 F.R.D. 379 (E.D. Pa. 1983).

While plaintiff does not expressly seek relief from judgment directly, for all practical purposes, a successful independent action will effect relief from the earlier judgment. I am concerned that the policies and purposes of Rule 60 would be seriously compromised if plaintiff was allowed to proceed in this matter without regard to that rule.

The fraud allegedly perpetrated in this case was nondisclosure of allegedly relevant discovery information and perhaps perjury as a result thereof. This kind of misconduct does not amount to "fraud upon the court" and therefore plaintiff's action, judged by the standards of Rule 60, is deficient. *See, Petry v. General Motors Corp.*, 62 F.R.D. 357 (E.D. Pa. 1974); *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833 (5th Cir. 1980). In both *Petry* and *Kerwit*, the courts held that allegedly false and misleading answers to interrogatories and nondisclosure of pertinent facts to the adverse party or the court does not amount to "fraud upon the court." *Petry v. GMC*, 62 F.R.D. at 359, *Kerwit Med. Prods. v. N & H Instruments, Inc.*, 616 F.2d at 837. *Petry* further concluded

that perjury by a witness did not amount to "fraud upon the court." *Petry v. GMC,* 62 F.R.D. at 360-61. Fraud upon the court is found only where there has been the most egregious misconduct that involves a corruption of the judicial process itself. *Petry v. GMC,* 62 F.R.D. at 361, *citing, Lockwood v. Bowles,* 46 F.R.D. 625 (D.C. Cir. 1969).

The alleged misconduct in the present case which is substantially similar to that alleged in the above-cited cases, might constitute fraud under Fed.R.Civ.P. 60(b)(3). Such conduct, however, does not amount to "fraud upon the court," and it is therefore, subject to the one year time limitation imposed by Rule 60(b). If plaintiff were allowed to proceed with an independent action that alleged nothing more than Rule 60(b)(3) misconduct, the strict time limitation of Rule 60(b) would be rendered ineffective. Perhaps even more compelling is the fundamental purpose of Rule 60(b) which is to ensure the finality of litigation. That purpose is particularly evident in the present case.

For all these reasons, plaintiff's motion to amend her complaint is denied and this action is dismissed.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	)	
	)	
v.	)	CIVIL ACTION
	)	
	)	NO. 85-2794
RIVAL MANUFACTURING COMPANY	)	
	)	

ORDER

NOW, March 11, 1986, upon consideration of plaintiff's motion for reconsideration and motion for leave to amend, defendant's responses, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that

1. Plaintiff's motion for reconsideration is DENIED.

2. Plaintiff's motion for leave to amend is DENIED and this action is DISMISSED.

/s/ Daniel H. Huyett, 3rd, Judge